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No. 82-485

IN THE

Supreme Court of the United States

October Term, 1982

KATHY KEETON,

Petitioner,

vs.

HUSTLER MAGAZINE, INC., LARRY C. FLYNT, LFP, INC. and L.F.P., INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

IN SUPPORT OF AFFIRMANCE

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*, AND BRIEF OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. AS *AMICUS CURIAE*

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MOTION OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Association of American Publishers, Inc. ("AAP") hereby seeks leave of this Court to file a brief as *amicus curiae*, pursuant to Rule 36 of the Rules of this Court, urging affirmance of the decision of the court below in favor of respondents Hustler Magazine, Inc. et al., holding that the Due Process Clause of the Fourteenth Amendment precludes an out-of-state plaintiff from suing an out-of-state publisher for libel in a forum which has little interest in adjudicating the dispute. This motion is necessitated by the refusal of counsel for petitioner, Kathy Keeton, to grant permission to file such brief. AAP's brief, conditionally filed herewith, is annexed to this motion.

Interest of the *Amicus*

The AAP is the major national trade association for book publishers in the United States. Its more than 300 members include large commercial book publishers and small or non-profit publishers, university presses and scholarly associations. Many of these publishers market their books on a national basis, often through independent distributors who in turn sell to bookstores, schools, universities and libraries across the country. Others are regional publishers who, while often hoping that their books will achieve a national market, distribute on a predominantly local basis. All of the AAP's members share a firm commitment to the free dissemination of ideas and the need to prevent erosion of First Amendment rights.

This lawsuit involves not merely the application of the due process rules developed by this Court to the exercise of a state's long-arm jurisdiction; it involves as well a fundamental determination of the extent to which a private litigant is to be permitted to wreak havoc with the policy determinations of 50 individual states concerning the time limits within which libel actions must be commenced. By narrowly circumscribing such time limits, those policy determinations quite uniformly reflect a sensitivity to the "need for a vigorous and uninhibited press" notwithstanding "the legitimate interest in redressing wrongful injury." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).*

* The Appendix to the annexed brief sets forth the statutes of limitations for libel actions in the 50 states and the District of Columbia. Twenty-eight of these statutes mandate the bringing of libel actions within one year or less, while seventeen provide a two-year period.

Petitioner Keeton simply went shopping for a forum —any forum—whose statute of limitations for libel actions had not yet run by the time her initial lawsuit against the publisher respondents had been determined to be time barred in the State of Ohio. The lower court opinions here properly noted that the forum so selected—New Hampshire —otherwise had little reason to adjudicate Keeton's libel claim, since neither she nor the publisher respondents were residents of, or otherwise had substantial contacts with, the state, and since any injury to Keeton's reputation was caused by activity outside of New Hampshire.

Most importantly, the court of appeals recognized that the very state statute-of-limitations policies designed to "provide . . . publishers security against lawsuits . . . long delayed" would be thwarted were libel plaintiffs such as Keeton permitted to bring actions for all damages suffered everywhere* "as long as there is any state anywhere with a statute of limitations that has not yet expired." (18a)**

AAP's members are justifiably proud of their tradition of fulfilling their First Amendment mandate by providing the nation with the means to engage in "uninhibited, robust, and wide-open" debate on issues of public importance. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). In fulfilling this duty, AAP's members also constantly live with the threat of punitive and potentially de-

* Under the "single-publication" rule of most jurisdictions, a libel plaintiff is permitted to bring only a single lawsuit for all injuries alleged to be sustained arising out of a particular publication. *See, e.g., Gregoire* v. *G.P. Putnam's Sons*, 298 N.Y. 119, 124 (1948).

** The lower court opinions are cited by reference to the Appendix to the Petition for Certiorari.

bilitating libel actions. The decision of the court of appeals in this case—determining the inappropriateness both of subjecting a publisher to suit in a remote jurisdiction with which it (let alone the plaintiff) has little relationship, and of permitting libel plaintiffs, through blatant forum shopping, to circumvent the protections sought to be provided to publishers by individual state policies—gives the necessary encouragement to publishers to continue in their assigned task. Conversely, were that decision to be overturned by this Court, the negative impact upon a vigorous publishing process in general, and upon the creation and broad dissemination of books in particular, would be significant.

The annexed brief presents the AAP's view as to why the decisions below unquestionably were correct, under governing due process and First Amendment principles. It also addresses the untoward implications for book publishers of any other result. We therefore respectfully request that AAP's motion for leave to file the annexed brief be granted.

Respectfully submitted,

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BRIEF ON BEHALF OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. AS *AMICUS CURIAE*

Interest of the *Amicus*

The interest of the *amicus curiae* is set forth in the preceding motion papers.

Statement of the Case

This case presents the issue of whether, consistent with the First and Fourteenth Amendments, a court may assert

in personam jurisdiction in a libel action against a magazine publisher where the publisher's contacts with the forum state are minimal at best, and the forum state lacks any interest in adjudicating the dispute because the plaintiff is a nonresident of the forum state and has no reputation to protect there. It is critical to the free dissemination of ideas and information that the decision of the court below, resolving this question in favor of the publisher defendants, be affirmed.

Because the facts and procedural history of this case are somewhat unusual and figured prominently in the lower courts' decisions, they will be briefly summarized here.

Petitioner Kathy Keeton is a resident of the State of New York and is associate publisher and senior vice president of Penthouse magazine. Keeton commenced an action in the United States District Court for the District of New Hampshire in October of 1980, alleging that she was libelled by photographs and text appearing in the September, 1975 issue of Hustler magazine and a cartoon appearing in the May, 1976 issue. This action, however, was not the first brought by Keeton over these publications. In 1977, Keeton sued the same parties who are respondents herein in Ohio (the state of incorporation of Hustler Magazine, Inc. and LFP, Inc.), alleging libel and invasion of privacy. Her libel claim was dismissed on the grounds that it was barred by the Ohio statute of limitations; her invasion of privacy claim was dismissed on the grounds that it was barred by the migratory New York statute of limitations. By that time, Keeton's claim was also time barred in every other state except New Hampshire, which had a six-year

ance with the applicable law. Looking first only at the magazine publishers' contacts with New Hampshire, the court held that, were protection of such publishers the only relevant concern, the court could find, although just barely, that due process standards had been met. (5a) However, the district court correctly felt compelled to look beyond the publishers' contacts with the forum state to the reasonableness of asserting jurisdiction from the standpoint of the forum state's interest in adjudicating the dispute. In that context, the court declined to assert jurisdiction, finding that Keeton had failed to demonstrate any connection with the state and that the state had no interest in adjudicating the dispute that was not shared by every other state and foreign country in which Hustler is published.[3]

In its opinion affirming the decision of the district court, the United States Court of Appeals for the First Circuit likewise examined not only the publishers' sparse connections with New Hampshire, but the extent of Keeton's contacts with the state as well. Such examination led the court of appeals to the wholly appropriate conclusion that, given that Keeton's only contact with New Hampshire was the appearance of her name in fine print on the credits page of three magazines distributed monthly in New Hampshire, and further given that the great majority of alleged injury to her reputation occurred outside New Hampshire, New Hampshire lacked the state interest necessary to support a finding of personal jurisdiction over an out-of-state publisher having minimal contacts with the

3. The court specifically found that the appearance of Keeton's name on the credit pages of Penthouse magazine did not create a reputation for her in New Hampshire. (7a)

forum. In so concluding, the appeals court properly interpreted and followed the decisions and policies of this Court applying the principles of due process to the question of personal jurisdiction in such a fact setting.

ARGUMENT

I. The courts below correctly held that the Due Process Clause precludes an out-of-state plaintiff from suing an out-of-state publisher for libel where the publisher's contacts with the forum state were minimal, the plaintiff's contacts even more minimal, and the forum state's interest negligible.

The decisions of this Court make plain that the propriety of asserting personal jurisdiction in a given case consistent with the Due Process Clause of the Fourteenth Amendment depends upon a multiplicity of factors, including, but by no means limited to, the defendant's contacts with the forum state. The appropriate factors to be considered were recently enumerated by the Court in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). After noting that due process fundamentally entails the notion of "reasonableness" or "fairness"—a notion established by this Court in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945),[4] and firmly engrafted upon the

4. In *International Shoe* the Court noted that the due process determination must take account of "such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there," as well as of "the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." 326 U.S. at 317, 319.

law of due process by virtue of subsequent decisions[5]—the Court stated:

> Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, *see McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 223 (1957); the plaintiff's interest in obtaining convenient and effective relief, *see Kulko* v. *California Superior Court, supra*, at 92, at least when that interest is not adequately protected by the plaintiff's power to choose the forum, *cf. Shaffer* v. *Heitner*, 433 U.S. 186, 211, n.37 (1977); the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies, *see Kulko* v. *California Superior Court, supra*, at 93, 98.

Id. at 292.

The court of appeals and, before it, the district court, faithfully weighed these factors in the context of the facts presented. That they properly gave weight to factors other than merely the defendant publishers' contacts with the forum is hardly a basis for reversal, as Keeton suggests. Rather, as we discuss below, the lower courts' conclusion that it was inappropriate to allow petitioner Keeton to maintain her libel suit in New Hampshire reflected an unexceptionable application of the governing due process considerations laid down by this Court in *World-Wide Volkswagen* and other cases.[6]

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5. *See McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957); *Hanson* v. *Denckla*, 357 U.S. 235 (1958).

6. We discuss in Point II of this brief the additional support for the result below based upon the special role of the press in our society and the First Amendment considerations that accordingly must be brought to bear on a due process analysis involving press activities.

The appeals court thus appropriately examined the State of New Hampshire's interest in adjudicating Keeton's libel claim. It having been determined that Keeton was not herself a resident of New Hampshire, that her sole contact with the state was the appearance of her name on the credits page of a magazine read by a relative handful of New Hampshire residents, and that "[n]early all the damages the plaintiff seeks arise from injury to her reputation outside of New Hampshire caused by activities that took place outside of New Hampshire" (18a), the court's conclusion that "New Hampshire has no special interest in protecting a nonresident against this out-of-state activity" (*id.*) was entirely sound and in keeping with this Court's prior due process decisions.[7]

Likewise, the courts below recognized that Keeton had the opportunity to protect her "interest in obtaining convenient and effective relief" by bringing her action in a "forum having a rational nexus with the parties and events which give rise to this action." (7a) Keeton herself so acknowledged, having initially attempted to bring suit in Ohio, where the corporate defendants are located. The fact that her suit was dismissed there because it was not timely filed was regarded by the appeals court as providing no justification for the subsequent initiation of litigation in

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7. *Compare Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958) (exercise of jurisdiction properly declined where defendant's limited contacts with forum state did not provide state with "a substantial connection" with subject matter of suit), *with McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 223 (1957) (jurisdiction predicated on contract with "substantial connection" with state and state's "manifest interest" in protecting its own residents). *See also Curtis Publishing Co. v. Birdsong*, 360 F.2d 344, 346 (5th Cir. 1966) (court declines to assert jurisdiction in libel action, noting this Court's requirement that "the State which seeks to subject a nonresident to its judicial jurisdiction must have a definite interest in the litigation").

New Hampshire. Indeed, in determining that the opposite conclusion was warranted, the court observed:

> [T]hese very circumstances suggest why it would be *unfair* to allow plaintiff to sue. . . . [S]tatutes of limitations in general—and certainly in plaintiff's home state—penalize a plaintiff who sleeps on her rights, as has Ms. Keeton, and provide defendant publishers security against lawsuits so long delayed. To allow a multistate defamation suit here would thwart such policies by exposing a publisher to the risk of suit covering all damage suffered everywhere as long as there is any state anywhere with a statute of limitations that has not yet expired.

(18a, emphasis added, citations omitted)

In so rebuffing Keeton's back-door attempt to revive her dead libel claim, the court below again acted entirely within the proper scope of its constitutional mandate. This Court has repeatedly emphasized as a fundamentally limiting factor in the due process analysis even outside of the context of libel actions, the "territorial limitations on the power of the respective States," *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958), and the need "to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. at 291-92.

The court of appeals further recognized that yet another consideration articulated in *World-Wide Volkswagen* —the interest in efficient resolution of controversies and furthering fundamental state policies—would be better served by a refusal to assert personal jurisdiction in this case. The court noted in this connection that because of

the peculiar nature of a libel action, in which, under the single publication rule adopted in most jurisdictions, a plaintiff must seek to recover in one suit all damages suffered, the interests of the federal system and of the several states would have been better served had Keeton brought her claim in a timely manner in a state where she had suffered a cognizable injury to her reputation and where the defendants' contacts were far more substantial.

For all of the foregoing reasons, the decisions below reached the correct conclusion based upon this Court's controlling due process precedents.

II. The decision below should be affirmed based upon First Amendment considerations and the nature of the publishing process.

Petitioner Keeton would have this Court regard this case as if it were a products liability action involving strictly commercial goods. But of course it is not. The court of appeals noted the "special" nature of this case, involving as it does "a libel allegedly caused by a publication that circulated in more than one state." (17a) In light of this "distinctive element" (*id.*), the court below correctly exhibited especial sensitivity to the implications of asserting jurisdiction over the publishing defendants.

As we discuss below, the lower court's solicitude for the activities of publishers comports with persuasive authority which mandates that due consideration be given to the First Amendment in a jurisdictional determination such as that posed here (Part A), and reflects a commendable recognition of the realities of the publishing process (Part B).

For these reasons as well, the decision below should be affirmed.

A. The First Amendment precludes the assertion of jurisdiction in this case

Even if this Court were to conclude that, applying a traditional due process analysis, it might be appropriate to assert jurisdiction over publishers under the circumstances of this case, AAP submits that First Amendment considerations preclude such a result. While this Court has never, so far as AAP is aware, had occasion to consider the impact of the First Amendment upon the issue of *in personam* jurisdiction over out-of-state publishers in connection with libel actions,[8] a number of lower courts properly have concluded that the "minimum contacts" threshold necessary to satisfy due process requirements is higher in connection with such actions than in other, run-of-the-mill tort cases. The rationales of those decisions, which underscore the propriety of the conclusion as to the lack of jurisdiction reached by the courts below, and which AAP urges are appropriate for adoption by this Court, are discussed briefly below.

In *New York Times Co.* v. *Connor*, 365 F.2d 567 (5th Cir. 1966), the court, in determining whether due process would permit the exercise of jurisdiction in a libel suit against an out-of-state publisher, concluded that "First

8. This issue has, however, been squarely presented to the Court in *Calder* v. *Jones*, No. 82-1401, *appeal docketed* February 22, 1983, in the context of the State of California's assertion of personal jurisdiction over nonresident employees of the publisher defendant. AAP has filed an *amicus* brief in that case as well, urging the Court to give due regard to First Amendment considerations arising out of such jurisdictional issues.

Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity." 365 F.2d at 572.[9] The court there expressed concern over the potential inhibiting effects on the publishing process were such a rule not invoked. It recognized that a publisher might well discontinue distribution of its works in a state where the size of its circulation did not warrant the danger of exposure to liability for libel. The court concluded that a publisher's decision not to publish in such states would impermissibly deprive state residents who wished to read the publication of the opportunity to avail themselves of the publisher's works.[10]

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9. The court cited for support *Walker* v. *Savell*, 335 F.2d 536, 544 (5th Cir. 1964), in which it had declined to confer jurisdiction over an out-of-state publisher "because of the inherent danger or threat to the free exercise of the right of freedom of the press if jurisdiction in every state can be inferred from minimal contacts."

10. For other cases that also have held, in libel actions involving nonresident publishers, that First Amendment considerations are relevant to the determination of whether due process requirements have been met, see *Cox Enterprises, Inc.* v. *Holt*, 678 F.2d 936, 937-38, *reh'g granted on other grounds*, 691 F.2d 989 (11th Cir. 1982) ("federal jurisdiction is subject to First Amendment considerations when a nonresident publisher is sued for libel"); *Edwards* v. *Associated Press*, 512 F.2d 258, 266 (5th Cir. 1975) ("When a court attempts to assess whether jurisdiction over a defendant is reasonable, First Amendment considerations are a significant factor to be weighed"); *Curtis Publishing Co.* v. *Golino*, 383 F.2d 586, 592 (5th Cir. 1967) ("first amendment considerations are a factor relevant to a determination of the jurisdictional question"); *Gonzales* v. *Atlanta Constitution*, 4 Med. L. Rptr. 2146, 2148 (N.D. Ill. 1979); *Johnston* v. *Time, Inc.*, 321 F. Supp. 837, 845-47 (M.D.N.C. 1970), *aff'd in part and vacated in part on other grounds*, 448 F.2d 378 (4th Cir. 1971); *cf. Buckley* v. *New York Post Corp.*, 373 F.2d 175, 183-84 (2d Cir. 1967) ("the First Amendment could be regarded as giving *forum non conveniens* special dimensions and constitutional stature in actions for defamation against publishers and broadcasters").

Since *Connor*, other court decisions have, in similar fact settings, likewise recognized that First Amendment considerations require a showing of more substantial contacts with the jurisdiction than otherwise would be required. *See Edwards* v. *Associated Press*, 512 F.2d 258, 266 (5th Cir. 1975) ("we have woven, in regard to entities clothed with First Amendment protections, a tighter due process net around state power than is true with regard to other entities"); *McCabe* v. *Jenkins and Associates, Inc.*, 531 F. Supp. 648, 654 (E.D. Pa. 1982) ("Courts confronted with this inherent tension between the first and fourteenth amendments to the Constitution have generally required a more substantial presence within the forum state in order to sustain *in personam* jurisdiction over publishers").

The court in *McCabe*, declining to permit a Pennsylvania resident to sue a California-based magazine publisher in Pennsylvania for defamation and invasion of privacy arising out of its publication of plaintiff's photograph, articulated the relevant First Amendment considerations as follows:

> The chilling effect that imposition of jurisdiction over any publisher would have on the free exercise of first amendment rights mandates a subtly different due process analysis. If a publisher stands in peril of being haled into court in any jurisdiction simply because a citizen of that jurisdiction came into possession of one of its publications, no speech would be disseminated beyond the territory in which the speaker can afford to litigate. Thus, if courts freely found *in personam* jurisdiction over publishers of first amendment articles under the same standards imposed on commercial entities, the citizens of each state would soon find themselves with access only to those publica-

> tions with in-state revenues sufficiently high to justify the cost of litigation within that particular jurisdiction. In short, the legendary "free marketplace of ideas," a cornerstone of our constitutional scheme, would be transformed into a marketplace of ideas limited to those who can afford the cost of litigation in that particular marketplace.

Id.[11]

A fortiori, the First Amendment must act to bar a nonresident plaintiff's claim against a nonresident publisher with only the slightest contacts with the forum state.[12] Because a nonresident plaintiff generally has no reputation to protect outside the state of his residence, and because litigating in a remote and inconvenient forum where circulation is *de minimis* is fundamentally unfair to the publisher, the exercise of personal jurisdiction in such cases must be viewed as totally inappropriate.

B. A reversal of the decision below would have a serious impact on the important First Amendment functions performed by publishers

Libel suits by their very nature generally arise out of particularly provocative statements—exposes, articles or books that disclose facts or express opinions about individuals involved in activities in which the public has a legit-

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11. For other cases denying jurisdiction even where suit was commenced by a resident plaintiff see *Cox Enterprises, Inc.* v. *Holt*, 678 F.2d 936 (11th Cir. 1982); *Bradlee Management Services, Inc.* v. *Cassells*, 249 Ga. 717, 292 S.E.2d 717 (1982); *Gonzales* v. *Atlanta Constitution*, 4 Med. L. Rptr. 2146 (N.D. Ill. 1979); *McBride* v. *Owens*, 454 F. Supp. 731, 735 (S.D. Tex. 1978).

12. *See Margoles* v. *Johns*, 333 F. Supp. 942 (D.D.C. 1971), *aff'd*, 483 F.2d 1212 (D.C. Cir. 1973); *cf. Curtis Publishing Co.* v. *Birdsong*, 360 F.2d 344 (5th Cir. 1966).

imate interest. Those publishers bold enough, for example, to accuse public officials of misconduct, disclose irregularities in the operation of a business, criticize a prominent individual or establishment or satirize an event—in short, to heighten public awareness, stimulate public debate, and test conventional wisdom—also are the publishers most threatened by libel suits. The easier it becomes for potential plaintiffs to commence libel actions, subject publishers to the costs and burdens of litigation, and expose publishers to claims for often enormous compensatory and punitive damages awards, the more likely it is that such publishers will draw back from their vital roles, in favor of conservative editorial policies and bland editorial content.

Publishers are already saddled with the burden of being required to defend libel actions in jurisdictions in which they may, from the substantiality of their actiivties, have some reason to expect they may be sued. To sanction lawsuits against publishers in jurisdictions—often far removed from the situs of the publishers' principal activities—having the most tenuous relationship to them would create constitutionally intolerable burdens.

To the extent that a potential plaintiff is permitted freely to forum shop without regard to a "rational nexus" (7a) between the chosen forum, the activities of the publisher and the claimed injury, publishers will surely become less willing to take on the risk of litigation arising out of the creation of hard-hitting commentary and its broad dissemination. As this Court noted in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. at 297:

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will

> find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. *See Kulko* v. *California Superior Court, supra,* at 97-98; *Shaffer* v. *Heitner,* 433 U.S., at 216; and see *id.* at 217-219 (Stevens, J., concurring in judgment). The Due Process Clause, by ensuring the "orderly administration of the laws," *International Shoe Co.* v. *Washington,* 326 U.S., at 319, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

This effect will be even more pronounced for smaller and regional publishers with even fewer expectations of, and less ability to defend, suits in forums with which they have virtually no contacts. *See Curtis Publishing Co.* v. *Golino,* 383 F.2d 586, 592 n.13 (5th Cir. 1967).

Petitioner Keeton's simplistic response to the foregoing concerns is that distribution of Hustler magazine into New Hampshire was deliberate, as opposed to accidental, and that if respondent wants to avoid liability for libel in New Hampshire, it need only sever its connection with that state by ceasing to distribute there (Brief for Petitioner at 13). This argument is untenable, however, because it misconceives the nature of the publishing business and the goals sought to be fostered by the First Amendment. Unlike, for example, an automobile manufacturer, who might feasibly sever its connection with states in which it derives little revenue without working great injury to its business, *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. at 297, a publisher faced with a similar choice would be re-

quired to deny to the public "the circulation of information to which [it] is entitled" by virtue of the First Amendment's guarantees. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936).

Petitioner's argument is further belied by the nature of the distribution process for many book publishers' works. Often, the publisher exercises no control over the locale of distribution of particular works after initial sale to its distributors. This being so as to such works, the publisher cannot simply stop selling in particular jurisdictions where it may not wish to take the risk of being sued. Its only recourse would be to refrain from creating the controversial material at all—a result wholly at odds with the goals of the First Amendment.

The facts of this case dramatically underscore the potential for abuse inherent in allowing libel plaintiffs to "hale" publishers into remote jurisdictions. Petitioner Keeton's motives in selecting New Hampshire were plain: she wished to benefit from the state's atypically liberal, six-year statute of limitations for libel actions. (13a, 18a) As noted in the Appendix to this brief, most states have exhibited special solicitude towards publishers and the First Amendment considerations surrounding libel suits by enacting short—typically one- or two-year—statutes of limitations governing such actions. Had the court of appeals permitted Keeton's suit to proceed, it would, as it recognized, in effect have legislated a nationwide six-year statute for libel actions—thereby completely undermining the

strong policies of New Hampshire's sister states.[13] Such a result would clearly contravene both this Court's due process pronouncements, *World-Wide Volkswagen*, 444 U.S. at 291-92, and the appropriate deference to be given to overriding First Amendment principles.

Finally to be noted are the especially harsh consequences for book publishers were the decision below to be overturned. Unlike more ephemeral publications—such as newspapers—books enjoy a degree of permanency that makes their publishers particularly susceptible to long statutes of limitations. While the risk that a topical article in a daily newspaper might be sued upon some period of years after its publication will generally be slight, the same cannot be said of a book of continuing relevance found in community libraries and bookstores. To reverse the decision below and thereby effectively subject book publishers to the longest libel statute of limitations of the 50 states —even where their contacts with that state may otherwise be minimal—would be to deprive publishers of the protection which they so critically need against "lawsuits so long delayed." (18a)

13. A decision which permits a libel plaintiff to shop for a forum with a favorable statute of limitations may also enable that plaintiff to go forum-shopping for a favorable body of substantive law. Petitioner summarily dismisses this concern, arguing (without citation to a single authority) that a decision in her favor will not "subject defendants like Hustler to unpredictable and inconsistent results, for choice of law principles will uniformly select the appropriate substantive law to be applied, regardless of the situs of the litigation." (Brief for Petitioner at 14) But this facile assumption is far from clear. *See, e.g., Fleury* v. *Harper & Row Publishers, Inc.*, 698 F.2d 1022, 1025 (9th Cir. 1983): "Libel and invasion of privacy are transitory torts to which the law of the forum will normally be applied absent a strong governmental interest of another jurisdiction."

Conclusion

The court below, properly applying this Court's due process standards, correctly determined that petitioner Keeton could not maintain her libel suit against respondent publishers in the State of New Hampshire. The special nature of the publishing business, performing as it does essential First Amendment functions, reinforces the correctness of that conclusion.

Respectfully submitted,

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APPENDIX

State Statutes of Limitations Governing Libel Actions

One Year or Less

Alabama, ALA. CODE § 6-2-39(4) (1975)
Arizona, ARIZ. REV. STAT. ANN. § 12-541(1) (1981)
California, CAL. CIV. PROC. CODE § 340(3) (West 1982)
Colorado, COLO. REV. STAT. § 13-80-102 (1973)
District of Columbia, D.C. CODE § 12-301(4) (1981)
Georgia, GA. CODE ANN. § 9-3-33 (1982)
Illinois, ILL. REV. STAT. ch. 110 § 13-201 (1979)
Kansas, KAN. STAT. ANN. § 60-514 (1976)
Kentucky, KY. REV. STAT. ANN. § 413.140 (Supp. 1982)
Louisiana, LA. CIV. CODE ANN. art. 3536 (West 1953)
Maryland, MD. CTS. & JUD. PROC. CODE ANN. § 5-105 (1980 Repl. Vol.)
Michigan, MICH. COMP. LAWS ANN. § 600.5805(6) (Supp. 1983)
Mississippi, MISS. CODE ANN. § 15-1-35 (1972)
Nebraska, NEB. REV. STAT. § 25-208 (Reissue 1979)
New Jersey, N.J. STAT. ANN. § 2A:14-3 (West 1952)
New York, N.Y. CIV. PRAC. LAW § 215 subd. 3 (McKinney 1972 and Supp. 1983)
North Carolina, N.C. GEN. STAT. § 1-54 (1969 Repl. Vol.)
Ohio, OHIO REV. CODE ANN. § 2.305.11 (Page 1981)
Oklahoma, OKLA. STAT. tit. 12 § 95 (1981)
Oregon, OR. REV. STAT. § 12.120(2) (1981 Repl. Vol.)
Pennsylvania, 42 PA. CONS. STAT. ANN. § 5523(1) (Purdon 1981)
Rhode Island, R.I. GEN. LAWS § 9-1-14 (1956)
Tennessee, TENN. CODE ANN. § 28-3-103 (1956) [6 mo.]
Texas, TEX. REV. CIV. STAT. ANN. art. 5524 (Vernon 1958 and Supp. 1983)
Utah, UTAH CODE ANN. § 78-12-29 (1953)
Virginia, VA. CODE ANN. § 8.01-248 (1977 Repl. Vol.)
West Virginia, W.VA. CODE § 55-2-12(c) (Supp. 1982)
Wyoming, WYO. STAT. § 1-3-105(a)(v)(a) (1977)

Two Years

Alaska, ALASKA STAT. § 09-10.070 (1973)
Connecticut, CONN. GEN. STAT. ANN. § 52-597 (West 1960 and Supp. 1982)
Delaware, DEL. CODE ANN. tit. 10 § 8119 (1974 Rev.)
Hawaii, HAWAII REV. STAT. § 657-4 (1976 Repl. Vol.)
Idaho, IDAHO CODE § 5-219 (1947)
Indiana, IND. CODE § 34-1-2-2 (1976)
Iowa, IOWA CODE ANN. § 614.1 (West Supp. 1983)
Maine, ME. REV. STAT. ANN. tit. 14 § 753 (1964)
Minnesota, MINN. STAT. § 541.07 (1982)
Missouri, MO. REV. STAT. § 516.140 (1978)
Montana, MONT. CODE ANN. tit. 27 ch. 2 § 204 (1981)
Nevada, NEV. REV. STAT. § 11.190(4)(c) (1981)
North Dakota, N.D. CENT. CODE § 28-01-18 (Supp. 1981)
South Carolina, S.C. CODE § 15-3-550 (1976)
South Dakota, S.D. COMP. LAWS ANN. tit. 15 ch. 2 § 15 (1967 and Supp. 1982)
Washington, WASH. REV. CODE § 4.16.100 (1976)
Wisconsin, WISC. STAT. § 893.57 (1979-80)

Three Years

Arkansas, ARK. STAT. ANN. § 37-206 (Repl. 1962)
Massachusetts, MASS. GEN. LAWS ANN. ch. 260 § 4 (West 1983)
New Hampshire (actions accrued after Aug. 28, 1981), N.H. REV. STAT. ANN. § 508:4, II (Supp. 1981)
Vermont, VT. STAT. ANN. tit. 12 § 512 (1973 and Supp. 1982)

Four Years

Florida, FLA. STAT. § 95.11(3)(o) (1981)
New Mexico, N.M. STAT. ANN. § 37-1-4 (1978)

Six Years

New Hampshire (actions accrued prior to Aug. 28, 1981), N.H. REV. STAT. ANN. § 508:4, II (Supp. 1981)